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No. 88-28

IN THE
Supreme Court of the United States
October Term, 1988

IN RE SEIZURE WARRANT
CYRIL ONWUASOANYA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

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Notwithstanding its victories in two lower courts, the Government has suddenly decided to abandon the fray by agreeing to return petitioner's funds it unlawfully seized eighteen months ago. Although the Government believes that this decision automatically moots the case, (Mem. 5) we think otherwise.

1. Contrary to the assertion that the United States Marshal has custody of the cashier's check sent by petitioner's bank to the DEA, (Mem. 2, 4) and inferably all the Marshal need do is turn it over to petitioner, we are informed* that the check was deposited in the Riggs Bank on April 10, 1987, by the Marshal's Service into an interest bearing general holding

*Source: Mrs. Betty Bryant, Assistant Seized Property Officer, U.S. Marshal's Service, Washington, D.C.

account pending resolution of the case. Having dealt with the federal bureaucracy for over two decades, counsel is far from confident that in these circumstances petitioner will obtain his money anytime soon. Although the Solicitor General is anxious to have this case rendered moot, we notice that neither he nor any of his deputies have personally undertaken any steps during the ninety days that the petition has been pending to assure the return of the funds to petitioner, relying instead upon other interagency action to effect that goal. At bottom, petitioner is no better off now than he was when his Rule 41(e) motion was filed, thus leaving us with a very real live controversy.

2. In seeking to buy its way out of an apparently troublesome case, the Government's buyout plan embraces petitioner's funds and no other. However, since these funds have been illegally held for eighteen months,[1] petitioner is clearly entitled to receive the interest he would have earned had his bank account not been raided. After all, if the Government sought to moot this case, it should properly have done so over a year ago before the court of appeals rendered its judgment, rather than wait until the eleventh hour. In this context it is not unfair to conclude that, absent the petition, the Government's largesse would not have been forthcoming. Furthermore, the Government has absolutely no claim, over and above that of petitioner's, to the interest his money has earned while deposited in the general holding account of the Marshal's Service. Were it otherwise, the Government would literally profit from its own wrongdoing. Thus, we submit, that the failure of the Government to proffer any "interest on money illegally held for a period of time "precludes a finding of mootness. *Ellis v. Railway Clerks*, 466 U.S. 435, 441-442 (1984) "[A]s

[1]An assertion properly assumed for present purposes. See Pet. n.2 and text.

long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*

3. Regardless of whether the money is returned, the case will not be moot because the underlying dispute is one "capable of repetition, yet evading review." *Gannett Co. v. De Pasquale*, 443 U.S. 368, 377 (1979).

a. The life-span of a Rule 41(e) motion in this context will not realistically survive full appellate review. In the future, all of the district judges in this jurisdiction will deny similar motions on the basis of the court of appeals' opinion herein, even if that judgment is vacated. In the latter event, they will doubtless look to the vacated opinion as an advisory ruling. While the judgment may be gone, its force and effect will surely linger on. Hard on the heels of any Rule 41(e) dismissal for want of jurisdiction, the Government will, nonetheless, normally either file a forfeiture proceeding or return the property. Either alternative will, obviously, preclude review of the dismissal; just as the Government is seeking to do now at this final stage of the appellate process. And, in the event a forfeiture action is filed, the Fourth Amendment issue can be raised directly therein.

b. Although it is unlikely that petitioner will be subject to the same action once more, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (n.11 at 110) suggests that this is not always required and that alternative considerations can fulfill this criterion. In *Gerstein*, for example, it was deemed sufficient that "a constant existence of a class of persons suffering the deprivation is certain." *Id.* Similarly, if past is prologue, we are assured of a steady stream of litigants seeking the return of their allegedly unlawfully seized property pursuant to Rule 41(e). In fact, some two months after the seizure herein, an elite unit was created in the Metropolitan Police Department

whose sole mission is to seek out property for forfeiture that is allegedly tied to narcotic trafficking; *i.e.*, the Financial Investigation Unit headed by Lt. Zelford C. Platt. In this connection, we are informed that the seizure of money alone, unattended by arrests for narcotic possession offenses, is on a steady increase here, mainly occurring at motels, train and bus stations. This, no doubt, mirrors what is happening around the country which includes all of the airports, where drug interdiction teams are in constant operation. See, *e.g.*, *In re Search and Seizure, Al James Harper*, 835 F.2d 1273 (8th Cir. 1988); *United States* v. *$8,850, infra.*

Another factor militating against mootness herein, is the rather remarkable situation wherein the ruling below directly conflicts with and frustrates Justice O'Connor's directive to aggrieved persons to promptly file Rule 41(e), motions "if the initial seizure was believed to be improper." *United States v. $8,850*, 461 U.S. 555, 569 (1983). Indeed, on May 18, 1988, present counsel refused to pursue a seizure of money unaccompanied by an arrest involving $34,475, although the seizure was believed to be unlawful, because of the roadblock erected by the opinion herein.[2] No other remedy counsel knows of provides a swifter or surer mechanism to restore unlawfully seized non-contraband property than Rule 41(e).

One final matter deserves comment. In seeking to apply the procedure outlined in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950) — intended to preclude the unfair effect of res judicata in moot *civil* cases — the Solicitor General wishes to obtain the equivalent of a confession or error without confessing error. In viewing this as a civil case, he has made

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[2]At that time the money was being processed for a potential civil forfeiture by none other than Detective Dwight Rawls, see Pet. p. 3, a member of the newly created Financial Investigation Unit.

precisely the same mistake as the court of appeals, which led it to erroneously conclude that Fed. R. Crim. P. 54(b)(5) barred our Rule 41(e) motion. This never has been a civil case, because no forfeiture action was ever filed concerning petitioner's funds.[3] See Mem. 1, 4.

CONCLUSION

For the reasons stated, we urge, that the instant case is not moot and that the Court should consider the petition for a writ of certiorari as submitted.

Respectfully submitted,

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[3]Once petitioner's money was in the custody of the government, nothing — other than the Fourth Amendment — prevented its use as evidence in a criminal prosecution against him.